

1 JOHN M. WALKER, JR., *Circuit Judge*, dissenting:

2 I would affirm the district court. The remaining plaintiffs in this
3 case have failed to specify that any actual injury was caused by the
4 President's alleged violation of the Emoluments Clauses, or how this
5 Court could redress such an injury. None of this matters, they say,
6 because the competitor standing doctrine allows us to ignore these
7 pleading failures and to find standing anyway. I disagree and would
8 hold that the complaint fails to sufficiently allege Article III standing.

9 Invoking constitutional provisions never directly litigated in
10 the 230-year history of our Republic prior to the Trump presidency,
11 the plaintiffs in this case claim that the President has inflicted
12 competitive injury on their businesses by maintaining ownership
13 over the Trump Organization's high-end hotels and restaurants and
14 accepting the business of foreign and state official clientele in
15 contravention of both the Foreign Emoluments Clause¹ and the
16 Domestic Emoluments Clause.² The plaintiffs, who are owners of
17 other high-end hotels and restaurants in New York City and
18 Washington, D.C.,³ allege that their businesses have suffered because

¹ "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. 1, § 9, cl. 8.

² "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7.

³ Only two plaintiffs remain in the appeal: Eric Goode and ROC United. Goode is the owner of "several celebrated hotels, restaurants, bars, and event spaces in New York," which include the Maritime Hotel, the Bowery Hotel, the Ludlow Hotel, the Jane Hotel, and the Park, Waverly Inn, and Gemma restaurants. Compl. ¶ 228. ROC United is a nonprofit organization that advocates for wages and

1 foreign and state government officials want what only the Trump-
 2 owned establishments can offer: “access to, influence on, and the
 3 good will of the President of the United States.”⁴

4 As this case comes to us now, it is about constitutional standing,
 5 not the precise meaning of the Emoluments Clauses. The meaning of
 6 the Clauses may be addressed elsewhere in due course, but even in
 7 their unresolved state, a few (largely uncontroversial) observations
 8 about the Clauses are in order. First, nothing in the plain text of either
 9 Emoluments Clause addresses competition in the marketplace or the
 10 conduct of business competitors generally. And neither can the
 11 Clauses be considered sweeping anti-corruption provisions. Facially,
 12 the Foreign Emoluments Clause concerns only the receipt of
 13 “emoluments” from foreign governments or their officials by those
 14 “holding any Office of Profit or Trust” on behalf of the United States
 15 and the Domestic Emoluments Clause only prohibits the President
 16 from receiving “emoluments” beyond the salary of the office from
 17 “the United States, or any or them.” Neither Clause addresses the
 18 receipt of benefits (whether or not they are “emoluments”) by the
 19 President from members of the public, private businesses, or private

working conditions for restaurant workers; it is made up of restaurant members and restaurant-employee members. [A66] The complaint alleges that several of ROC United’s restaurant members compete directly with the Trump International Hotel & Tower in New York, the Trump International Hotel Washington, D.C., and the restaurants inside the Trump Tower and Trump World Tower located in New York City. [A67] A declaration from an industry expert submitted by the plaintiffs names several restaurants associated with ROC United that compete directly with Trump-owned properties. In New York City, these establishments include: The Modern, Gramercy Tavern, Craft, and Riverpark. [A312–15] In Washington, D.C., the ROC United competitor restaurants are: the Riggsby, Minibar, Jaleo, Casolare Ristorante, and Zaytinya. [A319–22]

⁴ Compl. ¶ 150.

1 parties who seek government favors.⁵ Thus neither competition nor
 2 ordinary corruption are targeted by the Clauses or lie anywhere near
 3 the heart of this case.

4 What is meant by the term “emolument” in the Emoluments
 5 Clauses has yet to be determined by any federal court. Regardless of
 6 whether the Emoluments Clauses encompass, as the plaintiffs have
 7 urged, anything of value,⁶ or whether the Clauses capture a narrower
 8 range of exchanges,⁷ the text and historical meaning plainly do not
 9 evidence concern for protecting fair competition in the marketplace.

10 Of course, none of these observations foreclose the possibility
 11 (however slim) that parties may pursue a private right of action
 12 (should such a right be recognized) to remedy commercial harms

⁵ See U.S. Const. art. I, § 9, cl. 8; art. II, § 1, cl. 7.

⁶ See Appellants’ Br. at 6–7; see also Norman L. Eisen, Richard Painter & Laurence H. Tribe, Brookings, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump* 11 (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf (arguing that the Emoluments Clause warrants the “broadest possible construction to the payments it encompasses” and thus “unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state”); Zephyr Teachout, Opinion, *Trump’s Foreign Business Ties May Violate the Constitution*, N.Y. Times, Nov. 17, 2016, <https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/trumps-foreign-business-ties-may-violate-the-constitution>.

⁷ See Amandeep S. Grewel, *The Foreign Emoluments Clause and the Chief Executive*, 102 Minn. L. Rev. 639, 641–42 (2017) (arguing that the Foreign Emoluments Clause covers only “office-related compensation”); see also Robert G. Natelson, *The Original Meaning of “Emoluments” in the Constitution*, 52 Ga. L. Rev. 1 (2017) (arguing that “emolument[s] in the Constitution meant compensation with financial value, received by reason of public office”); Eugene Kontorovich, Opinion, *Did George Washington Take ‘Emoluments’?*, Wall St. J., Apr. 17, 2017, <http://www.wsj.com/articles/did-george-washington-take-emoluments-1492123033> (arguing that George’s Washington’s private business dealings while in office cast doubt on whether President Trump’s business holdings violate the Foreign Emoluments Clause).

1 wrought by violations of the Emoluments Clauses or exclude the
2 prospect that the Clauses as applied to a particular case could
3 somehow affect market competition. Neither clause on its face,
4 however, gives any indication that it is concerned with maintaining
5 competition, or that it protects a right enforceable in the manner the
6 plaintiffs have chosen to pursue.

7 Finally, this case is deeply political and thus finds itself in an
8 area where federal courts ought to tread lightly. President Trump was
9 democratically elected by the American people—and he was elected
10 with his business holdings and brand prominence in full view. What’s
11 more, it is evident from the text of the Emoluments Clauses that they
12 pertain to questions of separation of powers and, in particular, the
13 relationship between the President and the Congress. Whether the
14 courts should properly play any role pertaining to that relationship in
15 the context of the Clauses will have to be determined in the future.

16 I.

17 Whatever the resolution of these various background
18 questions, only one issue is before us now: have the plaintiffs
19 sufficiently alleged constitutional standing to challenge the
20 President’s alleged violations of the Emoluments Clauses? The
21 tripartite test for standing under Article III is well known: “an injury
22 must be concrete, particularized, and actual or imminent; fairly
23 traceable to the challenged action; and redressable by a favorable
24 ruling.”⁸ A plaintiff’s obligation to meet this test is an immovable
25 feature of our constitutional structure; constitutional standing is a
26 “bedrock requirement” and “an irreducible minimum” without

⁸ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks omitted) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

1 which there is no case or controversy under Article III of the
2 Constitution.⁹ And, the standing inquiry is “especially rigorous”
3 when the dispute implicates, as it does here, the separation of
4 powers.¹⁰

5 The plaintiffs, as the party invoking federal jurisdiction, bear
6 the burden of establishing constitutional standing.¹¹ At the pleading
7 stage, “the plaintiff must ‘clearly . . . allege facts demonstrating’ each
8 element.”¹² The “reviewing court[] must accept as true all material
9 allegations of the complaint, and must construe the complaint in favor
10 of the complaining party.”¹³

11 Here the pleadings do not particularize any direct injury
12 actually caused by violations of the Emoluments Clauses, much less
13 how such injury might actually be redressed by the courts. Rather, the
14 plaintiffs (and the majority) rely entirely on a shortcut known as the
15 competitor standing doctrine. This doctrine allows a competitor-
16 plaintiff the presumption of injury in fact, traceability, and
17 redressability when the plaintiff is almost sure to suffer a competitive
18 injury as a matter of “economic logic.”¹⁴

⁹ *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 472 (1982); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009) (articulating that Article III’s “Cases” and “Controversies” requirement is a “fundamental limitation” and is “founded in concern about the proper—and properly limited—role of courts in a democratic society” (internal quotation marks and citations omitted)).

¹⁰ *Clapper*, 568 U.S. at 408 (internal quotation marks omitted).

¹¹ *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016).

¹² *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

¹³ *Warth*, 422 U.S. at 501.

¹⁴ *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008).

1 The question of whether the competitor standing doctrine finds
2 any traction in private suits brought under the Emoluments Clauses
3 was recently addressed in *In re Donald J. Trump* by the Fourth Circuit,
4 the first circuit to do so.¹⁵ In that case, the District of Columbia and
5 the State of Maryland sued the President alleging that he violated the
6 Emoluments Clauses and that, among other injuries, those violations
7 harmed their proprietary interests as businesses competing with the
8 Trump Organization.¹⁶ The Fourth Circuit held, correctly in my view,
9 that the plaintiffs could not invoke the competitor standing doctrine
10 to achieve Article III standing.¹⁷

11 *Injury in fact.* The competitor standing doctrine “relies on
12 economic logic to conclude that a plaintiff will likely suffer an injury-
13 in-fact when the government acts in a way that increases competition
14 or aids the plaintiff’s competitors.”¹⁸ The doctrine allows plaintiffs to
15 proceed if the economically logical cause and effect between a
16 government action and increased competition is strong enough to
17 support an inference of injury in fact to the competitor, “even though
18 empirical analysis might conceivably have provided a higher level of
19 certainty.”¹⁹ Of course, this doctrinal exception does not excuse the
20 plaintiff from satisfying all three Article III standing requirements; all
21 it does is exempt the plaintiff from showing an actual or imminent
22 injury when the alleged harm arises in a market context where the
23 actual injury may be difficult to demonstrate but is almost sure to

¹⁵ *In re Donald J. Trump*, 928 F.3d 360, 363, 366 (4th Cir. 2019).

¹⁶ *Id.* at 363.

¹⁷ *Id.* at 377.

¹⁸ *Canadian Lumber*, 517 F.3d at 1332 (citing *Clinton v. City of New York*, 524 U.S. 417, 433 (1998)).

¹⁹ *Canadian Lumber*, 517 F.3d at 1333.

1 occur.²⁰ It bears repeating that the plaintiffs here rely on the
 2 competitor standing doctrine because they cannot show (and have
 3 not alleged) that they have suffered any particularized injury caused
 4 by the violations they allege.

5 Well-established precedent gives a competitor standing
 6 plaintiff latitude to allege competitive injury, but the competitive
 7 injury pleading exception, based as it is on economic logic, cannot be
 8 universally applied to every competitor. “[T]o establish an injury as a
 9 competitor a plaintiff must show that he personally competes in the
 10 same arena with the party to whom the government has bestowed the
 11 assertedly illegal benefit.”²¹ Other courts have correctly indicated that
 12 the plaintiff must be a “direct competitor[.]”²² The plaintiff must also
 13 show “an actual or imminent increase in competition, which increase
 14 [the court] recognize[s] will almost certainly cause an injury in fact.”²³

15 Taken in isolation, the phrase from Second Circuit precedent—
 16 injury is shown if the plaintiff “competes in the same arena”²⁴—can
 17 be read to suggest that a minimal allegation of direct competition is
 18 sufficient. In light of this seemingly low injury-in-fact bar, the
 19 majority opinion maintains that the plaintiffs have met this

²⁰ See, e.g., *El Paso Nat. Gas Co. v. F.E.R.C.*, 50 F.3d 23, 27 (D.C. Cir. 1995); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825–26 (9th Cir. 2011).

²¹ *In re U.S. Catholic Conference (USCC)*, 885 F.2d 1020, 1029 (2d Cir. 1989); **[JON (diss.), ALK, RJC]** see also *Ctr. for Reproductive Law & Policy v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002). **[JMcL, PNL, SS]**

²² *TrafficSchool*, 653 F.3d at 826; see also *Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993) (noting that the Supreme Court’s competitor standing cases “are all premised on a plaintiff’s status as a *direct competitor*” (emphasis in original)).

²³ *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010); see also *Inv. Co. Inst. v. F.D.I.C.*, 815 F.2d 1540, 1543 (D.C. Cir. 1987) (competitor standing satisfied when increased competition “plainly threatens’ economic injury”).

²⁴ *USCC*, 885 F.2d at 1029.

1 standard.²⁵ I agree with the majority that our prior cases are capable
2 of this broad reading, but after the Supreme Court's decision in
3 *Already, LLC v. Nike, Inc.*,²⁶ and upon close examination of the kinds
4 of cases that have applied the competitor standing doctrine, it is more
5 than evident to me that the doctrine does not, and should not, reach
6 this case.

7 In *Already*, the plaintiff, a shoe company, sought to challenge
8 one of Nike's trademarks even after Nike issued a broad covenant
9 promising not to pursue trademark claims against potentially
10 infringing *Already* products and any future similar products
11 manufactured by *Already*.²⁷ The Court rejected the theory that
12 *Already* had standing to challenge the validity of Nike's trademark
13 simply because it was Nike's competitor: "Taken to its logical
14 conclusion, the theory seems to be that a market participant is injured
15 for Article III purposes whenever a competitor benefits from
16 something allegedly unlawful—whether a trademark, the awarding
17 of a contract, a landlord-tenant arrangement, or so on. We have never
18 accepted such a boundless theory of standing."²⁸

19 *Already*'s theory of competitive injury was that the continued
20 existence of Nike's allegedly unlawful mark, notwithstanding Nike's
21 covenant with *Already*, deterred investment in its company, thereby
22 placing *Already* at a competitive disadvantage.²⁹ *Already* argued that
23 a large company like Nike used its allegedly invalid trademark to

²⁵ See Maj. Op. 18.

²⁶ 568 U.S. 85 (2013).

²⁷ *Id.* at 88–89.

²⁸ *Id.* at 99.

²⁹ *Id.* at 97–99; see also Br. for Petitioner, *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013) (No. 11-982), 2012 WL 3613367 at *33–34.

1 “bully small innovators” and that Nike’s broad covenant not to sue
2 could not “eradicate” the market effect of a “registered but invalid
3 mark.”³⁰ Thus *Already*’s theory of competitor standing did not turn
4 on whether *Already* planned to create a shoe to compete with a
5 particular Nike shoe not covered by the covenant not to sue,³¹ but was
6 instead a broader claim about competitive injury. *Already*’s
7 allegations of Nike’s intimidation tactics, if true, would have had a
8 negative competitive impact on *Already*’s business. Nike’s allegedly
9 unlawful conduct, in other words, would have placed *Already* on an
10 unlevel playing field.

11 In rejecting *Already*’s claim that this type of competitive injury
12 was sufficient to establish Article III standing, the Supreme Court was
13 quite clear that such a “boundless theory” of competitor standing is
14 unacceptable under Article III.³² Not every competitive injury—even
15 though a competitor’s allegedly unlawful actions may in fact skew the
16 competitive field to the plaintiff’s disadvantage—gives a competitor
17 standing to challenge that action.

18 The plaintiffs’ claim in this case is very much like the
19 competitor standing claim in *Already*. *Already* and Nike were
20 competitors (albeit mismatched in size) in the athletic-shoe market.³³
21 *Already*’s theory of competitive standing was that Nike’s allegedly
22 invalid trademark deterred investment in *Already* and thus
23 improperly chilled competition in that market. In this case, the
24 plaintiffs claim similarly that the President’s alleged constitutional

³⁰ *Already*, 568 U.S. at 99, 98.

³¹ See Maj. Op. 20–21.

³² *Already*, 568 U.S. at 99.

³³ *Id.* at 88.

1 violations are unlawfully skewing the competitive environment to his
2 advantage.

3 The majority distinguishes *Already* on the basis that the
4 plaintiffs here compete with the Trump-owned properties for
5 identical consumers.³⁴ But that is the wrong inquiry, and in any case
6 does not distinguish this case from *Already*. *Already* and Nike
7 competed for at least some identical consumers, “in the same arena”;³⁵
8 otherwise, there would have been no competitor issue in the case.
9 Competitors, by definition, are always seeking to attract buyers who
10 want the same goods or services. It is necessary rather to ask whether
11 that competition is such that the harm will likely occur, as a matter of
12 economic logic, from the violation of law alleged. Here, there is no
13 logical connection between the President’s alleged receipt of
14 emoluments and the competitive success of the Trump-owned
15 businesses. With or without the President’s receipt of “emoluments,”
16 there are myriad reasons why a non-Trump establishment would face
17 the same competition.

18 Moreover, it cannot be the case that, every time a competitor
19 achieves some benefit through allegedly unlawful conduct that has
20 no direct relationship to competition, competing businesses have
21 standing to challenge that unlawful action simply by virtue of their
22 status as a direct competitor.³⁶ Any number of potential illegal actions
23 by a business could cause its rivals to face stiffer competition without
24 giving rise to Article III standing. Take the example of an owner of a

³⁴ Maj. Op. 20–21.

³⁵ *USCC*, 885 F.2d at 1029.

³⁶ See *In re Donald J. Trump*, 928 F.3d at 377 (“At bottom, the [plaintiffs’] are left to rest on the theory that so long as a plaintiff competes in the same market as a defendant and the defendant enjoys an unlawful advantage, the requirements for Article III standing are met.”).

1 high-end restaurant in a competitive marketplace who fraudulently
2 applies for and receives a bank loan from an FDIC-insured bank, or
3 fraudulently applies for and receives a large tax refund. The
4 restaurant's illegally obtained funds might allow it to achieve a
5 market benefit available to no other competitor: the restaurant is able
6 to hire a superior chef and undercut competitors on menu pricing. As
7 a result, that restaurant's law-abiding competitors find themselves
8 facing increased competition. But do the restaurant's competitors
9 have competitor standing to hold the restaurant liable for its unlawful
10 action simply because they "compete[] in the same arena"?³⁷ As the
11 Supreme Court made clear in *Already*, the answer is no. The economic
12 logic necessary for competitor standing is measured between the
13 violation and the competitive harm, and in the hiring of the chef that
14 economic logic is non-existent. Such is the situation here. The mere
15 fact of competition is insufficient. Otherwise, courts would have to
16 entertain every claim by a competitor in which the defendant received
17 some unlawful benefit—a benefit unrelated to competition—simply
18 because that benefit could have an effect on competition.

19 All of this leads me to question the expansive scope of our
20 circuit's earlier precedent. To say that all a competitive injury requires
21 is a showing that the plaintiff "competes in the same arena" conflicts
22 with *Already*'s admonition that a market participant has not suffered
23 constitutionally significant injury "whenever a competitor benefits
24 from something allegedly unlawful."³⁸ Our formulation of this
25 standing theory needs to be construed in light of the Supreme Court's
26 limitations in *Already*. At any rate, even if our precedents required us
27 to conclude that plaintiffs sufficiently alleged a competitive injury in

³⁷ *USCC*, 885 F.2d at 1029.

³⁸ *Already*, 568 U.S. at 99.

1 fact, I have little doubt that they fail to satisfy the remaining,
2 indispensable Article III requirements of traceability and
3 redressability.

4 *Traceability.* For there to be Article III standing, the plaintiffs
5 must plausibly allege that their injury is “*fairly traceable* to the
6 challenged action of the defendant.”³⁹ Under the competitor-standing
7 doctrine, courts have typically found that traceability flows readily
8 from a competitive injury.⁴⁰ In these cases causation logically follows
9 given the nature of the violation: if the violation would necessarily
10 harm the plaintiff’s competitive opportunities, then an unlawful edge
11 to a competitor logically connects to that violation.⁴¹

12 But, again, this case is no ordinary competitor standing case.
13 The Emoluments Clauses do not regulate business or market activity
14 *as* business or market activity, nor would their violation as a general
15 matter be expected to affect competition.⁴² Conventional competitor
16 standing cases do not present difficult traceability questions precisely
17 because the allegedly unlawful action is directed at markets or market
18 behavior, and thus the connection between a market-affecting action
19 and a market effect is tight. The Emoluments Clauses were never

³⁹ *Lujan*, 504 U.S. at 560 (emphasis added) (internal quotation marks omitted).

⁴⁰ See *Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (finding that causation and redressability are “easily satisfied” in a competitor standing case); *New World Radio, Inc. v. F.C.C.*, 294 F.3d 164, 172 (D.C. Cir. 2002) (noting that, in “garden variety competitor standing cases” the “chain of causation” is “firmly rooted in the basic law of economics” (internal quotation marks omitted)).

⁴¹ See *Sherley*, 610 F.3d at 72 (competitive injury caused when “agencies lift regulatory restriction on [the plaintiff’s] competitors or otherwise allow increased competition against them” (internal citation and quotation marks omitted)).

⁴² See *infra* Part II.

1 intended to regulate market behavior, and thus economic logic is
2 absent.

3 The recognition that traffic increased at Trump-owned
4 establishments following President Trump's election is not enough to
5 show traceability. The plaintiffs must allege, beyond pure
6 speculation, that the unlawful acceptance of emoluments from
7 foreign and state government officials—not just the popularity of
8 Trump-owned establishments for a myriad of reasons—is causing the
9 plaintiffs' lost opportunity to compete on equal footing.⁴³ The
10 plaintiffs have not plausibly alleged that the desire to confer a
11 relatively modest⁴⁴ financial benefit on the President is the driving
12 force behind increased competition.⁴⁵ And this must be plausibly

⁴³ In *Schulz v. Williams*, we held that traceability was satisfied as long as the challenged action (a district court injunction, in that case) “could have caused [the plaintiffs’] injury.” 44 F.3d 48, 53 (2d Cir. 1994). But the bar is not as low, *see* Maj. Op. at 24, as this isolated language suggests. In *Schulz*, there was no speculation that the district court’s injunction caused the plaintiffs’ alleged electoral injury because there was no other action to which the asserted injury could have been traced. *Schulz* does not stand for the proposition that any action that theoretically “could have” caused the plaintiffs’ injury will suffice. At this stage, the plaintiffs must allege a plausible causal route, not merely a possible one.

⁴⁴ The Trump Organization claims it donated approximately \$150,000 in profit from foreign-government business to the U.S. Treasury in 2016 and approximately \$191,000 in 2017 to offset financial gains to the President. Rebecca Ballhaus, *Trump Organization Details Level of Profits from Foreign Governments*, Wall St. J., Feb. 25, 2019, <https://www.wsj.com/articles/trump-organization-details-level-of-profits-from-foreign-governments-11551116974>. This is an infinitesimal amount in relation to the President’s reported net worth of \$3 billion in 2019. Shahien Nasiripour & Caleb Melby, *Trump’s Net Worth Rises to \$3 Billion Despite Business Setbacks*, Bloomberg, June 12, 2019, <https://www.bloomberg.com/news/articles/2019-06-12/trump-s-net-worth-rises-to-3-billion-despite-business-setbacks>. Of course, these specific amounts remain untested and unconfirmed.

⁴⁵ *See In re Donald J. Trump*, 928 F.3d at 375 (“To begin, the District and Maryland’s theory of proprietary harm hinges on the conclusion that government customers are patronizing the Hotel *because the Hotel distributes profits or dividends*

1 alleged because it stands to reason that diplomats who patronize
 2 high-end hotels and restaurants do not make their choices solely
 3 based on profit distribution, but as people with wide-ranging tastes
 4 and varying interests. The plaintiffs' and the President's
 5 establishments exist in a virtual sea of luxury hotels and restaurants⁴⁶
 6 in which many different factors influence decision making and freely
 7 affect competition. There are simply too many variables at play (name
 8 recognition, boasting rights, better food, better service, more
 9 comfortable beds, reputation for quality, location close to the seats of
 10 power, to name a few)⁴⁷ to allow the plaintiffs to rest solely on the

to the President, rather than due to any of the Hotel's other characteristics. Such a conclusion, however, requires speculation into the subjective motives of independent actors who are not before the court, undermining a finding of causation." (emphasis in original) (citing *Clapper*, 568 U.S. at 413)).

⁴⁶ The plaintiffs' establishments, it should be noted, represent only a few of the many upscale restaurants and hotels located in New York City and Washington, D.C. By a rough count, there are approximately 115 five-star hotels in New York City and 47 in Washington D.C.. See Five Star Alliance, <https://www.fivestaralliance.com>. And when this lawsuit was filed in 2017, there were 77 Michelin star restaurants in New York City and 12 in Washington D.C. See *Michelin Guide 2017: New York's Best Restaurants*, Michelin Travel, <https://travelguide.michelin.com/reportage/michelin-guide-2017-new-yorks-best-restaurants>; *Michelin Guide Washington 2017: 12 Restaurants Earn Stars*, Michelin Travel, <https://travelguide.michelin.com/north-america/united-states/district-columbia/washington-dc/reportage/michelin-guide-washington-2017>. This count does not include the numerous high-end restaurants—like the ROC United restaurants Craft, Riverpark, Casolare Ristorante, and Zaytinya—that are not Michelin-starred. None of these other establishments have joined in this lawsuit to account for any possible competitive deprivation.

⁴⁷ See *In re Donald J. Trump*, 928 F.3d at 376 ("And, even if government officials were patronizing the [Trump International] Hotel to curry the President's favor, there is no reason to conclude that they would cease doing so were the President enjoined from receiving income from the Hotel. After all, the Hotel would still be publicly associated with the President, would still bear his name, and would still financially benefit members of his family. In short, the link between government

1 bare assertion that the President's acceptance of emoluments has
2 caused them competitive injury.

3 On this point, the majority criticizes the district court for an
4 error it did not make: requiring the plaintiffs to "dispel alternative
5 possible explanations" for their asserted injury.⁴⁸ Of course, the
6 majority is correct that a plaintiff need not disprove alternative causal
7 routes, but the district court required of the plaintiffs no such thing.
8 The district court instead listed factors that may influence whether a
9 diplomatic patron will or will not frequent a Trump-owned
10 property—"service, quality, location, price, and other factors related
11 to individual preference"⁴⁹—to illustrate why the causal chain in this
12 case is speculative.

13 That the plaintiffs are not required to disprove alternative
14 causation does not cure that they failed to plausibly allege *any* causal
15 chain. I agree with the majority that "allegations of fact must plausibly
16 support a 'substantial likelihood' that the plaintiff's injury was the
17 consequence of the defendant's allegedly unlawful actions."⁵⁰ A
18 review of the complaint, however, reveals few (if any) specific
19 allegations that diplomatic patrons are motivated by the desire to
20 confer emoluments on the President.⁵¹ The most that is plausibly

officials' patronage of the Hotel and the Hotel's payment of profits or dividends to the President himself is simply too attenuated.").

⁴⁸ Maj. Op. 22–23.

⁴⁹ *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 185–86 (S.D.N.Y. 2017).

⁵⁰ Maj. Op. 22 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1974)).

⁵¹ And, as the Fourth Circuit points out, "there is a distinct possibility . . . that certain government officials might *avoid* patronizing the [Trump International]

1 alleged is that Trump-owned properties attract diplomatic clientele,
 2 and that the President has publicly sought and encouraged such
 3 patronage.⁵² But these allegations fall short of plausibly alleging (or
 4 permitting a reasonably plausible inference) that increased
 5 competition is caused by the President's acceptance of emoluments.

6 The plaintiffs rely on a Washington Post article in which
 7 diplomats are quoted stating that they and their colleagues will favor
 8 Trump-owned properties.⁵³ None of these statements reveal a specific
 9 motivation to confer a financial benefit on President Trump. They
 10 indicate nothing more than that the primary motivator is Trump-
 11 brand loyalty. The plaintiffs' strongest argument cites a line from that
 12 same article: "In interviews with a dozen diplomats . . . some said
 13 spending money at Trump's hotel is an easy, friendly gesture to the
 14 new president."⁵⁴ This allegation is too scant to satisfy plaintiffs'
 15 burden to affirmatively plead that their competitive injury is traceable
 16 to the President's acceptance of emoluments.⁵⁵

17 Even if a government official were actually motivated to
 18 "enrich[]"⁵⁶ the President by staying at a Trump-owned hotel, the
 19 plaintiffs must plausibly allege that it is the acceptance of emoluments

Hotel because of the President's association with it." *In re Donald J. Trump*, 2019
 928 F.3d at 376.

⁵² Compl. ¶¶ 56, 58–87, 109, 196–97, 199–203, 206–11, 230–33.

⁵³ Appellants' Br. 38 ("Believe me, all the delegations will go there.") ("Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new president, 'I love your new hotel!'").

⁵⁴ Appellants' Reply Br. 12 (quoting Jonathan O'Connell & Mary Jordan, *For foreign diplomats, Trump hotel is place to be*, Wash. Post, Nov. 18, 2016).

⁵⁵ In my view, this is the case even after we accept the plaintiffs' (highly debatable) broad definition of emoluments.

⁵⁶ Maj. Op. 19, 21.

1 that is unlawfully distorting competition. The plaintiffs must
2 affirmatively allege that conferring a direct benefit on the President
3 makes a material difference when placed alongside all of the other
4 reasons for patronizing Trump properties. Without allegations to that
5 effect, the causal chain remains too speculative. To be sure, the
6 plaintiffs need not disprove all alternative causal routes, but the
7 plaintiffs still remain obligated to plead a casual chain that rises above
8 speculation.⁵⁷ This they have not done.

9 *Redressability*. Finally, the plaintiffs must show that it is “likely
10 . . . that the injury will be redressed by a favorable decision.”⁵⁸ Like
11 traceability, redressability frequently follows closely on the heels of a
12 competitive injury in fact, but it is still a distinct component of Article
13 III standing and must be plausibly alleged.

14 Wholly absent from the complaint are any plausible, non-
15 conclusory allegations that the sought-after remedy will lessen the
16 plaintiffs’ competitive injury.⁵⁹ At the point in the complaint at which
17 the reader might expect to be told how the remedy sought would
18 redress the competitive injury, the reader is left empty-handed. The
19 plaintiffs simply request that the court issue a declaratory judgment
20 that broadly defines the Emoluments Clauses as the plaintiffs would
21 like,⁶⁰ and ask for “[i]njunctive relief, enjoining [the President] from

⁵⁷ *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976) (“[U]nadorned speculation will not suffice to invoke the federal judicial power.”).

⁵⁸ *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

⁵⁹ *Iqbal*, 556 U.S. at 678.

⁶⁰ The plaintiffs request, among other things, that “Emolument . . . of any kind whatever” under the Foreign Emoluments Clause be defined to “cover anything of value,” and “any other Emolument” in the Domestic Emoluments Clause be defined to encompass “monetary and non-monetary payments or transactions, transactions granting special treatment, and transactions above marginal

1 violating the Foreign and Domestic Emoluments Clauses, as
 2 construed by this Court, and requiring [the President] to release
 3 financial records sufficient to confirm that [he] is not engaging in any
 4 further transactions that would violate the Emoluments Clauses.”⁶¹
 5 As for how this relief will remedy the plaintiffs’ competitive injury,
 6 the complaint only asserts in conclusory fashion that “the declaratory
 7 and injunctive relief . . . would provide a remedy for the many injuries
 8 described above.”⁶²

9 It comes as no surprise that the pleadings are insufficient as to
 10 redressability because they do not connect the relief requested to any
 11 effect on competition. The amicus brief by former national-security
 12 officials, relied upon by the plaintiffs,⁶³ cuts in the opposite direction
 13 from the argument that the plaintiffs use it to support. The brief
 14 highlights the plaintiffs’ redressability problem, pointing out the
 15 obvious: “our adversaries and even our allies seek every advantage
 16 that is available on the international stage.”⁶⁴ The various articles and
 17 statements cited by the plaintiffs demonstrate that diplomats choose
 18 to patronize Trump-owned properties for a variety of reasons—and
 19 most likely several reasons at the same time. None of them single out
 20 the conferral of emoluments. But, more to the point, there is no
 21 allegation that removing any one of the many possible incentives
 22 would cause diplomatic patrons to book at other establishments. To
 23 the contrary, as the former national-security officials point out,

cost” They ask the court to declare that the President’s conduct violates both provisions. *See* Compl. VI(a).

⁶¹ Compl. VI(b). One suspects that obtaining the President’s financial records may be the true reason for this lawsuit.

⁶² Compl. ¶¶ 239; 243; *see also* Compl. ¶ 242.

⁶³ *See* Appellants’ Reply Br. 12–13 (citing Br. of Former Nat’l Sec. Officials 21).

⁶⁴ Br. of Former Nat’l Sec. Officials 21.

1 officials are likely to continue to seek “every advantage”—and
2 continue to book at Trump-owned properties.

3 It is evident that the complaint fails to adequately plead
4 redressability because it is virtually impossible to plausibly connect
5 the purported cause of the plaintiffs’ alleged harm to the remedy they
6 claim to seek (but have not specified in the complaint)—an improved
7 competitive environment. Even if “the mere possibility that
8 customers might continue to favor the defendant’s product or service
9 after a court enjoins the violation does not defeat Article III
10 standing,”⁶⁵ plaintiffs here have not particularized any causal
11 connection between the alleged violation of the Emoluments Clauses
12 and their market disadvantage. When plaintiffs come before a court
13 unable to specify how the relief they seek will redress their injury,
14 “one must wonder why they came to the court for relief in the first
15 place.”⁶⁶ In any event, the fact that the plaintiffs plainly fail to do so
16 in the complaint is telling and is itself sufficient to defeat standing.

17 II.

18 As I have already noted, that the application of the competitor
19 standing doctrine in this case will not satisfy the requirements of
20 Article III standing is not surprising given the absence of economic
21 logic between the violation alleged (the transgression of the
22 Emoluments Clauses) and harm to the plaintiffs (competitive
23 disadvantage). The nature of the cases in this area merits further
24 elaboration. Only in certain categories has the economic logic been
25 tight enough for courts to permit competitor-plaintiffs to shortcut the
26 usual requirement of pleading injury in fact, traceability, and

⁶⁵ Maj. Op. 42.

⁶⁶ *In re Donald J. Trump*, 928 F.3d at 377.

1 redressability with particularity. These cases fall generally into three
2 categories: agency cases, election cases, and unfair competition cases.
3 It is only within these three categories that the cases relied upon by
4 the plaintiffs (and the majority) to support their competitive standing
5 theory can be found. In each of these three categories, the challenged
6 governmental action or non-action is directed at parties in their
7 capacity as a market player. This emoluments case, by contrast, fits
8 into none of these three categories, and it is not analogous to any of
9 them.

10 *Agency cases.* The competitor standing doctrine originated with
11 agency cases. The first of these cases before the Supreme Court,
12 *Investment Company Institute v. Camp*, involved banking regulations
13 that allowed new institutions to enter certain financial sectors.⁶⁷

14 Following that decision, competitor standing cases premised
15 on a challenge to agency action have become common.⁶⁸ In *Adams v.*
16 *Watson*, the First Circuit held that out-of-state milk producers had
17 competitive standing to challenge state dairy regulations.⁶⁹ In
18 *Canadian Lumber Trade Alliance v. United States*, the Federal Circuit
19 determined that Canadian wheat producers could employ competitor
20 standing to challenge United States customs regulations designed to

⁶⁷ See *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620 (1970) (investment companies had standing to challenge the regulation of national banks); *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403 (1987) (competitor brokerage trade association had standing to sue over banking regulations); *Nat. Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (banks and bankers association had standing to sue over credit union regulations).

⁶⁸ Some cases in this category could fall under the broader heading of “governmental action.” See *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) (farmers’ cooperative had competitor standing to challenge the President’s line item veto of a bill provision that would have benefitted the cooperative).

⁶⁹ *Adams*, 10 F.3d at 920, 925.

1 aid American wheat producers.⁷⁰ The D.C. Circuit, in *Sherley v.*
2 *Sebelius*, held that adult stem cell researchers had competitive
3 standing to challenge new regulations authorizing the National
4 Institutes of Health to fund embryonic stem cell research.⁷¹ I could go
5 on.

6 In the agency context, where the government regulators are
7 effectively choosing winners and losers in the marketplaces that they
8 regulate, affording the plaintiff the presumption of injury,
9 traceability, and redressability makes sense. There is no doubt, for
10 example, that when the government allows a commercial bank to
11 operate in a sector previously occupied only by investment firms,⁷²
12 the investment firms will suffer negative competitive effects because
13 more actors occupy the field. In these cases, the challenged
14 government action is directed at a *particular marketplace* with the aim
15 of regulating one or more of the players in *that market* in some way.
16 The government's decision to act in a way that gives a boost to some
17 players in that market or allows a new player to enter it, will, as a
18 matter of *economic logic*, be to the detriment of others.

19 *Election cases.* Competitor standing cases in the Second Circuit
20 have arisen in the election context. In *Fulani v. League of Women Voters*
21 *Education Fund*, the plaintiff, a presidential candidate, alleged that the
22 League of Women Voters violated its tax-exempt status by hosting a
23 primary debate that imposed certain admission requirements on the
24 debate candidates, thereby causing the plaintiff-candidate a

⁷⁰ *Canadian Lumber*, 517 F.3d at 1332.

⁷¹ *Sherley*, 610 F.3d at 73.

⁷² See, e.g., *Camp*, 401 U.S. at 620.

1 competitive injury when she was excluded from the debate.⁷³ We
2 held that she had competitor standing to challenge the League's tax-
3 exempt status.⁷⁴ The plaintiff in *Fulani* alleged that a law (aimed at
4 preventing *political* abuse of an organization's tax-exempt status in the
5 political marketplace) caused a competitive injury to her *political*
6 candidacy which plainly would be redressed if she were permitted to
7 debate. Her injury and its causation and redressability were self-
8 evident as a matter of logic.

9 Likewise, *Schulz v. Williams* involved an action by the
10 Libertarian Party to enjoin the operation of a New York election law
11 that had blocked its candidates from getting on the state ballot.⁷⁵ The
12 district judge granted the Libertarian Party an injunction. The
13 competitor-intervenor Conservative Party appealed on the basis that
14 the district court's injunction improperly placed Libertarian
15 candidates on the ballot and thereby siphoned votes away from it.⁷⁶
16 We held that the intervenor-Conservative Party had standing to
17 challenge the election law ruling that had allegedly caused it an
18 electoral injury.⁷⁷

19 Finally, in *In re U.S. Catholic Conference*, pro-choice advocates
20 had competitive standing to challenge the tax-exempt status of the
21 Catholic Church on the grounds that the Catholic Church had
22 unlawfully engaged in partisan activities by campaigning for pro-life

⁷³ *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 624 (2d Cir. 1989).
[EVG, RJC, LWP]

⁷⁴ *Id.* at 626.

⁷⁵ *Schulz*, 44 F.3d at 51–52.

⁷⁶ *Id.* at 52–53.

⁷⁷ *Id.* at 53.

1 causes.⁷⁸ By logic parallel to the agency cases, in each election case the
2 competitor-plaintiff sought to challenge election-related action that
3 allegedly had an obvious and direct negative impact on the plaintiffs'
4 own political activities.

5 *Unfair competition cases.* The third context in which the
6 competitor standing doctrine has arisen is in unfair competition
7 claims.⁷⁹ Courts routinely recognize constitutional standing for
8 competitors seeking to redress antitrust injury.⁸⁰ Suits by competitors
9 brought under the Lanham Act are also commonly allowed based on
10 competitor standing. In *TrafficSchool.com, Inc. v. Edriver, Inc.*, both
11 parties ran online traffic-school courses in the same market. The
12 plaintiff alleged that the defendant had engaged in false advertising
13 in violation of Lanham Act and state unfair competition laws—a
14 violation, unlike that here, that directly relates to competition.⁸¹ The
15 Ninth Circuit determined the competitor-plaintiff had standing
16 because they were direct competitors and “[s]ales gained by one are
17 thus likely to come at the other’s expense.”⁸² This case exemplifies
18 those cases in which, as a matter of economic logic, a competitor had

⁷⁸ USCC, 885 F.2d at 1022.

⁷⁹ See *TrafficSchool*, 653 F.3d at 825–26.

⁸⁰ See, e.g., *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (en banc) (recognizing Article III standing for a plaintiff allegedly injured by a competitor’s antitrust violations). The plaintiffs suggest that standing for competitors in these cases supports their broad proposition that “courts have upheld Article III standing when the illegal acts of private parties increase or distorted competition against a plaintiff” and evinces the doctrine’s application in “many other contexts.” Appellants’ Br. 28–29. But the plaintiffs miss the thread that ties all three categories of cases together: economic logic. The same economic logic that connects agency, election, and unfair competition competitor standing cases is absent in this case.

⁸¹ *Id.* at 824.

⁸² *Id.* at 825.

1 standing to challenge a rival's noncompliance with laws plainly
2 designed to regulate their competition in the common marketplace.

3 * * *

4 These are the three broad categories of cases in which courts
5 have extended to plaintiffs a presumption of competitive injury based
6 on common-sense market logic. The cases in each of these three
7 categories deal with challenged regulations, laws, and actions that
8 were directed at market players *in their role as market players*, which is
9 the key determinant that may warrant utilization of the competitor
10 standing exception. These cases stand for the proposition that
11 competitive injury in fact, together with causation and redressability,
12 can be presumed when the plaintiff can point to some government
13 action or inaction that *directly* regulates the conduct of a market player
14 operating in the same market. In other words, plaintiffs in these cases
15 were afforded competitor standing when they asserted a competitive
16 injury as a result of an unlawful activity that was itself directly related
17 to, and intended to regulate, the commercial or political marketplace.

18 The case before us is markedly different. The competitor
19 standing suit against the President has little in common with these
20 three categories of cases. Even accepting the plaintiffs' broad
21 construction of the Emoluments Clauses, the Clauses were never
22 designed to, and nor do they, directly regulate the marketplace or the
23 market player as it functions in the marketplace. The Emoluments
24 Clauses have never been characterized as market-oriented, no case
25 has ever stretched the competitor standing exception this far, and, as
26 is evident from the Supreme Court's decision in *Already*, such a stretch
27 goes further than the competitor-standing pleading exception can
28 bear.

1 In sum, because the plaintiffs lack standing to challenge the
2 President's alleged acceptance of emoluments under either
3 traditional standing principles or the competitor standing doctrine, I
4 respectfully dissent.